

Quo usque tandem, Viktorina

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This week, the EU Commission has presented its report on the rule of law situation in the European Union. All 27 member states had their judiciary, their anti-corruption infrastructure, their media landscapes and their constitutional checks and balances examined so that no one doubts that the rule of law, democracy and fundamental rights are the “bedrock of our societies and common identity,” as the Commission writes in the [indicative present tense](#). Great stuff, that report, full of true words and valuable insights about ourselves and others. We smug German model boys in particular have every reason to be satisfied, as we have come out of the [review](#) squeaky clean, to nobody’s surprise: By and large, everything is fine here, and even Verfassungsblog has received the Commission’s praise: “A widely respected platform for discussion on issues of the rule of law has gained in importance in recent years and has become a forum for both domestic and European discussions on the rule of law.” Much obliged, that’s very kind!

Elsewhere, though, things are not so great. In [Hungary](#), for example. Dangers are looming. The independence of the judiciary is a “source of concern”. There are “challenges” regarding the power of the president of the National Judicial Authority. Another “source of concern” is that the Supreme Court *Kúria* has declared unlawful a preliminary reference order to the ECJ. There are “risks” for the independence and effectiveness of media supervision. Oh, are they now? Dear me! Let’s hope it doesn’t come to that! Good thing that the EU rule of law mechanism is in place to help those who are struggling in their rule-of-law progress to catch up: “Identifying these challenges will help the member states to find solutions that protect the rule of law, in cooperation and mutual support of the Commission, other member states and stakeholders such as the Venice Commission”. ([S. 4](#))

Challenge. Risk. Concern. Call me a stickler, but given the state of affairs in Hungary, is this choice of words appropriate? Being exposed to a *risk* is what I am when, say, I drive my car at 150 m/h on black ice while I’m drunk. But once my car has wrapped itself around a tree, I am not exactly at *risk* any more, I should think. I am *dead*.

Remember those media laws back in 2010? It is ten years ago that Viktor Orbán has started walking over the EU and all its rule of law fuss. A whole decade! If there is one problem the EU doesn’t have with Hungary, that’s a problem of understanding the rule of law situation. Nor with Poland, Malta or Bulgaria, for that matter. Whoever is interested to know what is going on knows, and has known for a long time.

For ten years, the EU Commission has been wringing its hands, engaging in dialogue, expressing concerns, pointing out problems and pressing for solutions, while failing to do what its job is: guarding the treaties. Lili Bayer recently wrote down the whole sad story on [Politico.eu in a highly recommended report](#). The blame lies not with the Commission officials and not even with the individual Commissioners.

They mostly tried as hard as they can, but the limits of their abilities are set by politics, embodied by the Council and the Presidents of the Commission: Manuel Barroso, Jean-Claude Juncker, Ursula von der Leyen. Each of them was and is part of the same political alliances of which Orbán is a member, and which since 2010 have shielded him from any real trouble. For ten years. Up to the present day.

What alliances? There is another equally highly recommended recent news report, [Szabolcs Panyi's sensational piece "How Orbán Played Germany" for Direkt36, one of the last independent Hungarian media](#). Germany, the model boy, huh? We would like that, wouldn't we?

What would the course of history have been, had the EU chosen to defend the rule of law against Orbán's media policy instead of the political interests of his EPP friends ten years ago? We will never know.

Instead, year after year we will now be blessed with yet another report about those awful risks for the independent judiciary and those imminent dangers for media pluralism in this country or that and particularly in Hungary. (Over at the Council of Europe, the [ministerial committee has just decided for another year to censure Hungary](#) for still not having implemented the ECtHR *Baka* ruling of 2016 that judges must be safe from being fired for using their right to freedom of speech. Surprised, anybody?)

Instead, under the current German EU presidency, we will now probably be bestowed an EU budget with a "rule of law conditionality" that poses virtually no threat to the Orbán regime and will keep the EU transfer gravy train to Budapest running just as smoothly as ever to keep Orbán in a position to make his cronies rich, no matter what he comes up with next.

As I mentioned the German model boy: not just politically and economically, but also in terms of jurisprudence, Germany is now ascribed a hegemonic position in Europe that should be critically examined. This is the thesis of Armin von Bogdandy, Director at the MPI in Heidelberg, which we will put up for debate in an online symposium starting next week I am particularly looking forward to. This, I am sure, will be tremendously interesting.

The week on Verfassungsblog

Before I come to the review of the week: If **Donald Trump's COVID-19 infection** takes a severe course, it could throw the November election into chaos in a way that dwarfs everything discussed so far. Here is a [reading tip](#), if you have the stomach for it.

[SONJA PRIEBUS](#) also comments on the **EU Rule of Law Report** and is also not entirely convinced that this is where the solution to the problems with Hungary and Poland will be found. [RÉNATA UITZ](#) relates how Viktor Orbán is playing cat and mouse with the EU.

Poland has also been attested a lot of big-time challenges, risks and concerns, but here too, it seems to me that not the least of them is the hesitation of the EU Commission to defend the rule of law with all the means at its disposal. [LAURENT PECH](#), [KIM LANE SCHEPPELE](#) and [WOJCIECH SADURSKI](#) have received a lot of media response for their appeal to Commission President von der Leyen, within and without Poland. On Monday, the Disciplinary Chamber of the Supreme Court – a body which, according to the ECJ ruling, does not even deserve to be called a “court” – will hear the case for the waiver of the immunity of judge Igor Tuleya so that he can be removed from office and prosecuted. The sovietization of the Polish judiciary is not a risk, not some looming danger. It is present. It is happening, here and now and under the eyes of a partly helpless, partly unwilling EU Commission. [ALEKSANDRA GLISZCZY#SKA](#) and [JOHN MORIJN](#) explain what the Tuleya case is about and why it should shake not only the Poles but every citizen of the European Union to the core.

In our podcast “**We need to talk about the Rule of Law**” we will, by the way, focus on the topic of disciplinary sanctions against judges in our next episode and discuss that with ADAM BODNAR, SUSANNA DE LA SIERRA and NINA BETETETTO. Last week our topic was judicial nominations and the guests were [FILIPPO DONATI](#), [JOANNA HETNAROWICZ-SIKORA](#) and [CHRISTIANE SCHMALTZ](#). I found it very exciting and learned a lot.

In the **USA** the Republicans in the Senate are getting ready to cement their right-wing majority in the US Supreme Court. The Democrats in the House of Representatives, in turn, are working on a bill to limit the life term of the Justices to 18 years. [MARK TUSHNET](#) examines whether this will work. Trump’s nominee Amy Coney Barrett recently spoke at an event linked to the British Judicial Power Project people around John Finnis and Richard Ekins, which, according to [DAVID DYZENHAUS](#), should lead to questions at the Senate hearing.

In Germany, unlike in the USA, there is no reliable study to measure **racism** in the population. Home Secretary Horst Seehofer has announced plans to fill that gap. [JOHANNA SOLL](#) demands that first of all those affected by racism should be the heard.

[JULIA REDA](#) points to an upcoming ECJ judgement with potentially dramatic consequences. It is about **hyperlinks** and the question of the copyright of linked content, and the answer the Advocate General gave is remarkable, Reda notes.

In the opinion of [PAULINA PESCH](#), the plans of the EU Commission to combat sexual abuse of children might undermine the confidentiality of digital communication by restricting **private encryption measures**.

Lawyers keep being arrested in **Turkey** in staggering numbers, most recently 50 lawyers in a raid in Ankara. [ALI YILDIZ](#) describes the means by which the Turkish Court of Cassation undermines the protection of criminal defense lawyers from prosecution.

At the EU's external borders, the EU is increasingly turning to informal means of pursuing its **migration and asylum policy**. This topic is discussed in an online symposium we have put up together with the Asser Institute in The Hague this week, with an introductory post by [NARIN IDRIZ und EVA KASSOTI](#), and contributions by [CATERINA MOLINARI](#), [ANDREA OTT](#), [NARIN IDRIZ](#), [AYSE DICLE ERGIN](#), [AYSEL KÜCÜKSU](#), [EMANUELA ROMAN](#) and [SUNA GÜLFER IHLAMUR-ÖNER](#).

So much for now. It remains for me to express, as usual, the wish for your support on [Steady](#). No pressure, you don't have to, of course, only then, well, you know...

[You, Sir, Are A Freeloader. GIF](#) from [Freeloader GIFs](#)

Just kidding. Either way: all the best to you, stay safe and take care!

Max Steinbeis

